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Supreme Court of the United States

October Term, 1968

No. 1276

WILLIAM H. ROBERTS,
Petitioner,

v.

WILLIAM J. McDONALD
and
THE CATHOLIC UNIVERSITY OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM H. ROBERTS
Petitioner pro se

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	3
Proceedings in the Courts Below	3
Summary of Facts	4
REASONS FOR GRANTING THE WRIT	6
ARGUMENT	6
I. The Writ Should Be Granted Because the Court of Appeals Decided a Federal Question in a Way Conflicting With Applicable Decisions of This Court and of Other Courts of Appeals	6
II. The Writ Should Be Granted To Protect the Policy Expressed by This Court in Rules 34(b) and 47 *Fed. R.* App. P.	10
III. The Writ Should Be Granted in Support of the Constitutional Requirement for Sufficiently Clear and Reasonable Standards and for Due Notice in the Administration of Justice	11
IV. The Writ Should Be Granted in the Exercise of This Court's Power of Supervision Over the Court of Appeals	12

Page

V. The Writ Should Be Granted in View of the Importance of the Issue of the Scope of Immunity of Universities From Judicial Review 15

CONCLUSION 21

Appendix A – Judgment, United States Court of Appeals for the District of Columbia Circuit 1a

Appendix B – Opinion per curiam, United States Court of Appeals for the District of Columbia Circuit 3a

Appendix C – Order, United States District Court for the District of Columbia (Filed November 21, 1967) 6a

Appendix D – Findings of Fact and Conclusions of Law, United States District Court for the District of Columbia (Filed November 21, 1967) 7a

Appendix E – Order, United States District Court for the District of Columbia (Filed February 8, 1968) 12a

Appendix F – Oral Remarks, United States District Court for the District of Columbia (February 2, 1968) 13a

Appendix G – Order, United States Court of Appeals for the District of Columbia Circuit (Filed March 11, 1968) 14a

Appendix H – Order, United States Court of Appeals for the District of Columbia Circuit (Filed April 3, 1968) 15a

Appendix I – Order, United States Court of Appeals for the District of Columbia Circuit (Filed August 6, 1968) 16a

Page

Appendix J – Order, United States Court of Appeals for the District of Columbia Circuit (Filed August 21, 1968) 17a

Appendix K – Order, United States Court of Appeals for the District of Columbia Circuit (Filed October 8, 1968) 18a

Appendix L – Order, United States Court of Appeals for the District of Columbia Circuit (Filed November 15, 1968) 20a

Appendix M – Affidavit of Sylvia D. Crutchfield (August 30, 1968) 21a

Appendix N – Affidavit of Richard L. Hirshberg, Esq. (August 30, 1968) 24a

Appendix O – Act Supplementary to, and Amendatory of, the Incorporation of The Catholic University of America (P.L. 70-235, 45 Stat. 402 (1928) 27a

Appendix P – Advisory Committee's Note to Rule 2, Fed. R. App. P 29a

Appendix Q – Rules 8(d), 11(d), and 12(b) of the General Rules of the Court of Appeals 30a

Appendix R – Order of and parts of opinion of United States Court of Appeals for the District of Columbia Circuit of ~~January 3, 1969~~, December 16, 1968 No. ~~21,974~~ 20,862 in *Levin v. Clark* 31a

Appendix S – Order of and parts of opinion of United States Court of Appeals for the District of Columbia Circuit of January 3, 1969 in *Thornton v. Corcoran* (Case No. 21,974) 36a

Page

TABLE OF CASES

American Smelting and Refining Co. v. Godfrey,
158 ~~185~~ F. 225 (8 Cir. 1907), cert. den. 207 U.S.
597 (1907) 20

Barenblatt v. ~~Ford Motor Co.~~ United States,
360 U.S. 109 (1959) . . . . . ~~18~~ 17

Bateman v. Ford Motor Co.,
310 F.2d 805 (3 Cir. 1962) 8

Benson Hotel Corp. v. Woods,
168 F.2d 694 (8 Cir. 1948) 20

Commissioner of Internal Revenue v. Duberstein,
363 U.S. 278 (1960) 8

Commonwealth v. Keenan,
347 Pa. 574, 33 A.2d 244 (1943). 14

Coppedge v. United States,
369 U.S. 438 (~~1961~~ 1962) 15

Dalehite v. United States,
346 U.S. 15 (1953) 8

Deal v. Cincinnati Board of Education,
369 F.2d 55 (6 Cir. 1966) cert. den.
389 U.S. 847 (1967) 8

Epperson v. State of Arkansas,
~~389 U.S. 266 (1968)~~ 89 S.Ct. 266 (1968) 18

Feathersone v. Barash,
345 F.2d 246 (10 Cir. 1965) 8, 9

F.T.C. v. Rhodes Pharmacal Co.,
191 F.2d 744 (7 Cir. 1951) 7

Giaccio v. State of Pennsylvania,
382 U.S. 399 (1966) 12

Hamilton Watch Co. v. Benrus Watch Co.,
206 F.2d 738 (2 Cir. 1953) 20, 21

Page

House of Materials v. Simplicity Pattern Co.,
298 F.2d 867 (~~1962~~) 20

I.C.C. v. Cardinale Trucking Co.,
308 F.2d 435 (3 Cir. 1962) 8

Kelley v. Everglades Draining District,
319 U.S. 415 (~~1942~~) 7

Kinsella v. United States,
361 U.S. 234 (~~1959~~) 14

Levin v. Clark (unreported),
U.S. Court of Appeals for the District of Columbia Circuit, dated December 16, 1968, No. 20,682 15

Love v. Atchison, T. & S.F. Ry.,
185 F. 321 (8 Cir. 1911) 20

Ohio Oil Co. v. Conway,
279 U.S. 813 (1929) 20

Porter, Price Administrator v. Lee,
328 U.S. 246 (1946) 11

In Re Sarisohn,
27 A.D.2d 466, 280 NYS 2d 237 (1967) 14

Shannon v. Retail Clerks Protective Association,
128 F.2d 553 (7 Cir. 1942) 8

Silberblatt v. United States,
353 F.2d 545 (5 Cir. 1965) 8

Thornton v. Corcoran (unreported),
U.S. Court of Appeals for the District of Columbia Circuit, dated January 3, 1969, No. 21,974 15

United States v. El Paso Natural Gas Co.,
376 U.S. 651 (1964) 9

United States v. Forness,
125 F.2d 928 (2 Cir. 1942) 8

Woods Construction Co. v. Pool Construction Co.,
314 F.2d 405 (10 Cir. 1963) 8

Page

STATUTES AND RULES INVOLVED

Act supplementary to, and amendatory of, the incorporation of the Catholic University of America (Public Law 235, Seventieth Congress, First Session, 45 Stat. 402 (1928) 3

28 U.S.C. Section 1254 (1) 2

28 U.S.C. Section 1651 21

Interlocutory Appeals Act (1958) 14 13

Federal Rules of Appellate Procedure:

Rule 2 . . . . . 14 13
Rule 26(b) 13
Rule 27(b) 2, 12, 13 12, 13, 14
Rule 28(c) 14 14
Rule 31(a) 13
Rule 34(b) 10, 11
Rule 35(b) 12
Rule 45(c) 2, 11, 12
Rule 47. . . . . 10, 14

Federal Rules of Civil Procedure

Rule 52(a) 2, 6, 9, 10

General Rules of the Court of Appeals 30a

Rule 8(d). 6, 12
Rule 11(d) 6, 10, 11
Rule 12(b) 6, 10, 11

OTHER AUTHORITIES

Page

Advisory Committee's Note to Rule 2 Fed. R. App. P. 13

American Jurisprudence 2d 12

Note: "Academic Freedom," 81 *Harvard Law Review* ~~(1968)~~ 1045. (1968.) . . . 18, 19

Note: "Judicial Control of Actions of Private Associations," 76 *Harvard Law Review* ~~(1963)~~ 983 (1963.) ~~18~~ 17,

"*Review of Student Discipline in Tax Supported Institutions of Higher Education,*" 45 F.R.D. 133 (D.C. W.D. Missouri *En Banc*, 1968) 19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on January 17, 1969 (App. A).*

CITATIONS TO OPINIONS BELOW

The per curiam opinion of the Court of Appeals, filed January 17, 1969, is unreported and is printed in Appendix B, *infra* pp. ~~2a-3a.~~ 3a-5a The findings of fact and conclusions of law of the District Court, filed November 21,

* The Appendix to this petition is referred to herein as "App." and the record certified from the courts below is referred to as "R". Petitioner was the plaintiff in the District Court and the Appellant in the Court of Appeals.

7a-11a

1967, are printed in Appendix D, *infra* pp. ~~5a-8a.~~ The Order of the District Court, filed February 8, 1968, is printed in Appendix E, *infra.* The Oral Remarks made by the District Court in the hearing on February 2, 1968, are printed in Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1969 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals in affirming the Orders of the District Court denying Petitioner's motions for preliminary injunctions interpreted and construed Rule 52(a) *Fed. R. Civ. P.* in a way which (a) conflicted with applicable decisions of this Court; and (b) conflicted with decisions of other courts of appeals on the same matter;

2. Whether Rules 11(d) and 12(b) of the General Rules of the Court of Appeals are consistent with Rules 34(b) and 47 *Fed. R. App. P.;*

3. Whether Rule 8(d) of the General Rules of the Court of Appeals meets the constitutional requirements of providing sufficiently clear and reasonable standards for sound judicial determinations in the administration of justice;

4. Whether assignment of the instant case to another division of the Court of Appeals without serving notice of entry on Petitioner violated his constitutional right to due notice as, specifically, amplified by Rules 27(b), 27(c), 35(b) and 45(c) *Fed. R. App. P.*

5. Whether, in the circumstances of the instant case, the Court of Appeals departed so far from the accepted and usual course of judicial proceedings, and sanctioned so far such a departure by the District Court, as to call for

an exercise of this Court's power of supervision pursuant to Rule 19 of the Rules of this Court; specifically, whether, in the circumstances of the instant case, the Court of Appeals violated by arbitrary and unreasonable delays Petitioner's constitutional right "to have justice administered without delay".

STATUTES AND RULES INVOLVED (See page (vi))

STATEMENT

The Proceedings in the Courts Below

The jurisdiction of the District Court was based on Title II, Section 521(a)(1), District of Columbia Code (1961 Edition, Supplement V, 1966). Respondent, The Catholic University of American (hereinafter "University"), is a recognized educational institution, chartered for non-profit educational purposes by the District of Columbia, which Charter was approved and amended by Congress (App. O).

On October 24, 1967, Petitioner filed in the District Court a motion for preliminary injunction which the University's Academic Senate (hereinafter "Senate") mooted by a resolution passed on October 26, 1967. On the aforesaid date, the Senate also passed a resolution recommending to the University's Board of Trustees (hereinafter "Board") to dissolve as of February 7, 1968, the University's Institute of International Law and Relations (hereinafter "Institute"), which was administered by Petitioner who was the Institute's Director. (R. 321-345).

On November 2, 1967, Petitioner filed in the District Court an amended motion for preliminary injunction (hereinafter "first motion") seeking to enjoin the University, and others acting in concert with it, from implementing or carrying out the aforesaid Senate resolution, and also from taking any action having the same effect, or from altering the status of the aforesaid Institute (R. 190-191). The District Court denied Petitioner's aforesaid first motion and filed its Order together with Findings of

Fact and Conclusions of Law on November 21, 1967 (App. C, D).

On January 22, 1968, Petitioner filed in the District Court another motion for preliminary injunction (hereinafter "second motion") which was based on grounds different from those on which Petitioner had relied in his first motion, and also on additional material which had previously not been discoverable. The District Court denied the aforesaid second motion and filed its Order, without findings of fact and conclusions of law, on February 8, 1968 (App. E).

Petitioner filed notices of appeal from the denial of the first motion on November 28, 1967, and from the denial of the second motion on February 15, 1968. On February 8, 1968, the Respondents filed in the Court of Appeals a motion to dismiss the appeal from the Order of the District Court of November 21, 1967, because of mootness. This motion was denied by the Court of Appeals on March 11, 1968 (App. G). Upon motion of Petitioner, the Court of Appeals by its Order of April 3, 1968 (App. H) consolidated the aforesaid appeals for all purposes.

On November 15, 1968, the Court of Appeals ordered that the consolidated cases be placed on a summary calendar (App. L). After oral argument on January 7, 1969, the Court of Appeals affirmed the Orders of the District Court by its Judgment and Opinion per curiam, filed on January 17, 1969 (App. A, B).

Summary of Facts

On January 21, 1965, the Executive Committee of the Board authorized the then Rector, i.e., President, of the University to conclude an agreement with Petitioner regarding the establishment of a new academic unit, the Institute, and regarding Petitioner's appointment as Director of the aforesaid Institute (R. 444-445). The aforementioned agreement was concluded on February 5, 1965

(R.374-388) and the Institute's activities under Petitioner's directorship commenced as of September 1, 1965. Even prior to this date, certain influential faculty members, who were also members of the Senate, had started a concerted campaign against the Institute and Petitioner which campaign was later also extended to include the Institute's faculty and students (R.322-326). Under the pressure of this campaign, the administration of the University started to violate its legal duties under the aforesaid contract by failing, *inter alia,* to provide the Institute—in spite of a rapidly growing student body—with adequate financial, academic and administrative support (R.326-328). Finally, on May 25, 1966, Petitioner filed a complaint—and on September 27, 1966, an amended complaint—in the District Court asking, *inter alia,* for permanent injunctive and other necessary relief, as well as for damages covering the period until May 1966, i.e., a period ending 1½ years prior to the filing of the first motion for preliminary injunction.[1] The Respondents entered a general denial. On October 16, 1967, a new acting administration of the University was appointed and ten days thereafter, i.e., on October 26, 1967, the Senate, without prior consultation with or notification of Petitioner, passed a resolution recommending to the Board on purported "policy" and "administrative" grounds that the Institute be dissolved (App. D, *infra,* pp.8a-10a). The Board, again without consultation with Petitioner, passed on November 12, 1967, a resolution dissolving the Institute as of February 7, 1968 (R.434-435). Substantial and uncontradicted evidence supports Petitioner's assertions that the action of the Board was arbitrary and unlawful, and that the actions taken showed clearly all elements of prima facie tort on the part of the University and others acting in concert.[1] (R.632-639).

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[1] Incidentally, in view of the irreparable injury sustained, Petitioner has not claimed damages for the period after May 1966.

REASONS FOR GRANTING THE WRIT.

1. The conflict between the interpretation and construction of Rule 52(a) *Fed. R. Civ. P.* in the courts below, and the decisions of this Court as well as other appellate courts (pp. 7-10, *infra*).

2. The importance and urgency to resolve with finality the question whether Rules 8(d), 11(d) and 12(b) of the General Rules of the Court of Appeals are consistent with the *Fed. R. App. P.* and/or meet constitutional requirements for specificity, etc. (pp. 10-12, *infra*).

3. The importance and urgency to exercise this Court's supervisory powers over the administration of justice in the Court of Appeals, specifically in view of recent severe criticisms by the aforesaid court's own judges (pp. 13-15, *infra*).

4. The importance of a clear-cut issue of law which should be decided by this Court in spite of the interlocutory character of the instant case because the issue is fundamental not only to the future conduct of the instant case but also for other cases, present and future. The aforesaid issue is that of the scope of immunity ~~(from below)~~ from judicial review ~~(pp. 16-21, *infra*)~~ of this Nation's universities and colleges (pp. ~~16~~-21, *infra*):

5. Finally, the instant case does not only involve the litigants but roughly 100 faculty members and students who matriculated in the Institute in reliance on the University's official announcements.

ARGUMENT

I.

The Writ Should Be Granted Because The Court Of Appeals Decided A Federal Question In A Way Conflicting With Applicable Decisions Of This Court And Of Other Courts Of Appeals.

1. The District Court denied Petitioner's first motion by its Order of November 21, 1967 which it filed together

with findings of fact and conclusions of law (App. C., D). The aforesaid motion was based on the ground that the violation of the legal duties incumbent upon the University pursuant to its aforesaid contract with Petitioner, namely, specifically, the duties of the University to forebear to incapacitate itself from performing the aforesaid contract and to forebear to interfere with Petitioner's performance of aforesaid contract, required the issuance of a preliminary injunction. (R. 194-198).

2. The District Court denied Petitioner's second motion by its Order of February 8, 1968. (App. E). The aforesaid second motion was based on grounds fundamentally different from those on which Petitioner had relied in his first motion. The grounds relied on in the aforesaid second motion were: (a) the wrongful conduct of the University in arbitrarily, maliciously and unreasonably dissolving the Institute during the term of Petitioner's service with the University; (b) regardless of the aforementioned contract, the wrongful conduct of the University in arbitrarily, maliciously and unreasonably dissolving the aforesaid Institute on eleven weeks' notice and in the middle of an academic year in violation of well-established academic usage requiring the gradual phasing out of academic units; and (c) ~~on~~ the public interest in protecting students from the adverse consequences of the dissolution of the aforesaid Institute in which they had matriculated in good faith and in reliance on the official announcements of the University. See *F.T.C. v. Rhodes Pharmacal Co.*, 191 F. 2d 744, 747 (7 Cir. 1951).

3. The findings of the District Court filed with its Order of November 21, 1967, (App. D) consisted exclusively of ultimate conclusions and fell, therefore, short of the requirements and standards established by this Court in *Kelley v. Everglades Draining District*, 319 U.S. 415, 420, 421 (1943), namely ~~that~~ that

> "...~~that~~ there must be findings in such detail and exactness as the nature of the case permits,

> of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated."

Also, this Court said in *Dalehite v. United States*, 346 U.S. 15, 24 n.8 (1953) that

> "Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. . .Otherwise the findings are useless for appellate purposes."

See also: *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 292, 293 (1960)

Deal v. Cincinnati Board of Education, 369 F. 2d 55, 63, 64 (6 Cir. 1966), *cert. den.* 389 U.S. 847 (1967)

Silberblatt v. United States, 353 F. 2d 545, 549 (5 Cir. 1965)

Featherstone v. Barash, 345 F. 2d 246, 249, 250 (10 Cir. 1965)

Woods Construction Company v. Pool Construction Company, 314 F. 2d 405, 406 (10 Cir. 1963)

Bateman v. Ford Motor Co., 310 F. 2d 805, 806, 807 (3 Cir. 1962)

I.C.C. v. Cardinale Trucking Co., 308 F. 2d 435, 436, 437 (3 Cir. 1962)

Shannon v. Retail Clerks Protective Association, 128 F. 2d 553, 555 (7 Cir. 1942)

United States v. Forness, 125 F. 2d 928, 942, 943 (2 Cir. 1942).

In addition, the findings of the District Court are a *verbatim* transcript of the findings suggested by Respondents which were filed on November 13, 1967, i.e., prior to the District Court's Order of November 27, 1967, granting Petitioner's motion to supplement record and admitting two additional affidavits (R. 203). Therefore, the

District Court disregarded completely that this Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 657 (1964) had "...underscored the responsibility of district courts with respect to findings, and was critical of any indiscriminate dependence upon counsel for formulating them" *Featherstone v. Barash supra* at 249.

4. As stated heretofore, Petitioner's second motion relied on grounds which were entirely different from those on which he had relied in his first motion. Nevertheless, the District Court ~~in~~ denying Petitioner's second motion deemed it sufficient to say in its oral remarks that there was

> "...nothing in the Second Amended Motion that would change the situation as it existed when Judge Sirica ruled...on the request to keep the matter in status quo." (App. F).

In its Order filed on February 8, 1968 (App. E) the District Court simply stated without any further findings that it denied Petitioner's second motion

> "...upon further consideration of the record and file in this case...and it appearing to the Court that the plaintiff has failed to make any showing that he is entitled to the extraordinary relief requested..."

It is submitted that the aforesaid general conclusory statements of the District Court were neither findings of fact nor did they, if erroneously considered to be such findings, meet the aforementioned requirements of Rule 52(a) *Fed. R. Civ. P.*

5. Clearly, the Court of Appeals in holding that

> "...it seems clear to us in any event that the findings of fact made in the District Court are beyond serious challenge under Rule 52(a) *Fed. R. Civ. P.*..."

decided a federal question in a way which was, as heretofore stated, in conflict with the aforementioned applicable

decisions of this Court and also in conflict with the aforementioned decisions of other courts of appeals.

II.

The Writ Should Be Granted To Protect The Policy Expressed By This Court In Rules 34(b) And 47 Fed. R. App. P.

1. In its Order of November 15, 1968 (App. [illegible]) the Court of Appeals placed the instant case "...*sua sponte* pursuant to Rule 11 of the General Rules of this Court...on the summary calendar." Rule 11(d) of the aforesaid General Rules of the Court of Appeals leaves it to the discretion of the aforesaid court to place an *individual* case on a summary calendar if it is, in the opinion of the Court of Appeals, "...of such character as not to justify extended oral argument..." Rule 12(b) of the aforesaid General Rules, then, provides that "..only 15 minutes to a side shall be allowed [for argument] to cases placed on the summary calendar..."

Clearly, Rules 11(d) and 12(b) of the aforesaid General Rules are inconsistent with Rule 34(b) *Fed. R. App. P.* which provides that

> "Unless otherwise provided for by rule *for all cases or for classes of cases*, each side will be allowed 30 minutes for argument" (emphasis added).

Since, pursuant to Rule 47 *Fed. R. App. P.*, courts of appeals have only been authorized to "...make and amend rules...not inconsistent with these rules," the Court of Appeals had no power to make Rules 11(d) and 12(b) of its aforementioned General Rules. Clearly, the policy expressed in Rule 34(b) *Fed. R. App. P.* is that Rule 44(3), last sentence, of the Rules of this Court, which the Court of Appeals attempted to re-state in Rule 11(d) of its General Rules, is not applicable to courts of appeals in view of their organizational structure which differs fundamentally from that of this Court. Therefore, Rule

34(b) *Fed. R. App. P.* provided for obvious reasons that the time allowed for argument under the aforesaid rules may not be changed by courts of appeals in *individual* cases but only "...by rule for all cases or for classes of cases..." Consequently, the Order of the Court of Appeals of November 15, 1968 placing the instant case on a summary calendar and, thereby, allotting to it pursuant to Rule 12(b) of the aforesaid General Rules "...only 15 minutes to a side..." violated Petitioner's rights pursuant to Rule 34(b) *Fed. R. App. P.*

III.

The Writ Should Be Granted In Support Of The Constitutional Requirement For Sufficiently Clear And Reasonable Standards, And For Due Notice In the Administration of Justice.

1. On February 8, 1968, Respondents filed in the Court of Appeals a motion to dismiss Petitioner's appeal. The aforesaid motion of Respondents was based on the assertion that the instant case had been mooted by the unlawful conduct of the University in dissolving the Institute and by the University's attempt to complete the acts which Petitioner sought to have enjoined by the courts. However, cf. *Porter, Price Administrator v. Lee*, 328 U.S. 246, 251 (1946). In its Order of March 11, 1968 the Court of Appeals (Judges Burger, Tamm and Robinson) denied Respondents' aforementioned motion. (App. G). However, the instant case came on to be heard and was decided by Judges McGowan, Leventhal and Robinson (App. A, B).

Although Petitioner was never served a notice of entry pursuant to Rule 45(c) *Fed. R. App. P.*, the Court of Appeals had obviously determined pursuant to Rule 8(d) of its General Rules that "...the instant case should be assigned...to a new division chosen by lot."

It is submitted that Rule 8(d) of the aforesaid General Rules of the Court of Appeals does not meet constitutional requirements by failing to provide any standards

whatsoever for the court's determinations to shift cases from one of its divisions to another. The aforesaid rule is so vague that it leaves the public uncertain as to the standards, if any, which will guide the Court of Appeals in making determinations under the aforesaid rule. It has been aptly stated that

> "The due process clause has as its purpose the insuring of the fair and orderly administration of the laws. . ." 16 Am. Jur. 2d 935.

This Court has only recently stated again that

> "Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards. . ." *Giaccio v. State of Pennsylvania,* 382 U.S. 399, ~~402~~, 403 (1966).

Clearly, Rule 8(d) of the aforementioned General Rules can easily lead to a policy of unreasonable and arbitrary re-assignments of cases, a policy which would be contrary to ". . .principle[s] of justice ranked as fundamental. . ." 16 Am. Jur. 2d ~~*supra*~~ 944.

2. As heretofore stated, Petitioner was never served a notice of entry pursuant to Rule 45(c) *Fed. R. App. P.* to the effect that the Court of Appeals had determined to re-assign the instant case to another division. The failure to give Petitioner due notice of the re-assignment of the instant case did not only violate his constitutional rights but also his rights and privileges thereunder and, specifically, pursuant to Rules 27(b), 27(c) and 35(b) *Fed. R. App. P.*

IV.

The Writ Should Be Granted In The Exercise Of This Court's Power Of Supervision Over The Court Of Appeals.

1. The Court of Appeals departed in many instances so far from the accepted and usual course of proceedings as

to call for an exercise of this Court's power of supervision. The aforesaid instances include, but are not limited, to the following:

(a) The Court of Appeals (Chief Judge Bazelon) arbitrarily and unreasonably (App. M, N) delayed proceedings for 43 days prior to issuing its Order of August 6, 1968 (App. I);

(b) The Court of Appeals (Chief Judge Bazelon) granted Respondents in the aforesaid Order of August 6, 1968 *sua sponte* and in violation of Rules 31(a) and 26(b) *Fed R. App. P.* an extension of 30 days ~~(App. I)~~ from the date of the aforementioned Order for filing their principal brief; (App. I);

(c) The Court of Appeals (Judge Wright) denied by its Order of August 21, 1968 (App. J) and in violation of Rule 27(c) *Fed. R. App. P.*, namely through another single judge, Petitioner's motion to review its aforementioned Order of August 6, 1968;

(d) The Court of Appeals (Chief Judge Bazelon) denied by its Order of October 8, 1968 (App. K) and in violation of Rule 27(c) *Fed. R. App. P.*, namely through another single judge, Petitioner's motion to vacate Judge Wright's aforesaid Order of August 21, 1968. Incidentally, the Chief Judge of the Court of Appeals himself, thus, ultimately denied, Petitioner's motion to review the Chief Judge's own Order of August 6, 1968;

(e) On several occasions (R. 713-716) Petitioner has had asked the Court of Appeals for speedy determination of his appeal from the Orders of the District Court on the ground, first, that such speedy determination was the purpose of the Interlocutory Appeals Act of 1958; secondly, ~~the~~ Rule 2 *Fed. R. App. P.* expressly extended that the aforesaid policy to all cases "...of pressing concern to the public [and] to the litigants" *Advisory Committee's Note to Rule 2 Fed. R. App. P.*; and thirdly, that the instant case was of pressing concern to the public and to the litigants. Nevertheless, the Court of Appeals

(Chief Judge Bazelon) failed for a period of fifty days, namely from August 19, 1968, to October 8, 1968, to rule on an untimely motion of the Respondents in which they had asked for an extension of time for filing their principal brief until October 7, 1968. In its Order of October 8, 1968, i.e., four days after the Respondents had finally filed their brief (which four-day period included a weekend), the Court of Appeals (Chief Judge Bazelon) directed the Clerk to file the brief ". . .it appearing that counsel for appellees have lodged appellees' brief. . .within the extended period of time requested by the aforesaid motion. . ." (App. K).

The aforesaid delay of fifty days in ruling on the motion of Respondents deprived Petitioner of his right pursuant to Rule 27(c) *Fed. R. App. P.* to file a motion requesting review if an order granting the aforesaid motion should have issued. Thus, this delay deprived Petitioner of his right to speedy determination of his appeal. The Court of Appeals by failing to rule promptly on the aforesaid simple motion for extension of time and by, thus, delaying the disposition of the motion until after the Respondents had filed their principal brief, also violated Petitioner's constitutional right to "have justice administered without delay." See *Commonwealth v. Keenan,* 347 Pa. 574, 33 A. 2d 244, 249 (1943); *In Re Sarisohn,* 27 A.D. 466, 280 NYS 2d 237, 243, 245 (1967).

In the words of this Court in *Kinsella v. United States,* 361 U.S. 234, 246 (1959) "It [due process] has to do. . .with the denial of that 'fundamental fairness, shocking to the universal sense of justice'."

(f) The Court of Appeals deprived Petitioner of his right pursuant to Rule 28(c) *Fed. R. App. P.* to file a reply brief by failing to rule sufficiently in advance of oral argument on his motion to strike the untimely principal brief of the Respondents. (R.). Considering the fact that Petitioner, as stated heretofore, had also been denied the right to present full oral argument pursuant to

Rule 34(b) *Fed. R. App. P.*, this Court's words in *Coppedge v. United States*, 369 U.S. 438, 446, 447, 453 (1961) apply fully to the instant case:

> "In so holding we have been impelled by considerations. . .that it is our duty to assure to the greatest degree possible, within the statutory framework of appeals created by Congress, equal treatment for every litigant before the bar.
>
> . . .we hold Petitioner has not yet received either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trail court."

2. Petitioner submits that the importance and urgency of the exercise of this Court's supervisory powers is enhanced by the fact that the administration of justice by the Court of Appeals has recently been severly criticized by its own judges. Since the cases referred to are yet unreported, parts of the opinions will be printed in the Appendix. (App. R, *infra* p. 31a; App. S, *infra* p. 36a).

V.

The Writ Should Be Granted In View Of The Importance Of The Issue Of The Scope Of Immunity Of Universities From Judicial Review.

1. The Court of Appeals said in its per curiam Opinion (App. B) that Petitioner

> ". . .concededly quarrels with the substance of the action taken to dissolve the Institute, and presses no claim of a lack of opportunity for hearing or other alleged procedual shortcoming."

It is submitted that the issues in the instant case are clearly fundamentally different from what the Court of Appeals believed them to be. Obviously, the issue of a hearing or issues pertaining to academic procedural rights

and their possible violation are not at all relevant to the instant case. The Court of Appeals must have been aware of this fact because it said in the preceding paragraph of its per curiam Opinion that

> "Appellant. . .is a professor at the University whose tenured position is not affected by the termination of the Institute. . ."

Clearly, these contradictions show, at least, lack of inner coherence and of consistency in the aforesaid per curiam Opinion.

In passing, the Court of Appeals recited in its Opinion the well-known fundamental requirements for the issuance of a preliminary injunction without, however, relating them in any way whatsoever to the circumstances of the instant case.

2. The Opinion of the Court of Appeals refers in general terms, and again without reference to the circumstances of the instant case, to a ". . .balancing of appellant's claimed injuries with appellees' *interest and convenience* in respect of the *efficient operation* of a university" (emphasis added).

The issues in the instant case arise from the contractual establishment of an academic unit of the University just 2½ years prior to the unit's dissolution. The Respondents did neither plead nor does the record show that the "interest and convenience" or "the efficient operation" of the University had changed in the course of 2½ years to such a degree that the attempted dissolution could be considered anything else but an unreasonable, arbitrary and malicious act. This would even apply if the academic unit had been established by administrative fiat rather than by contract. In fact, exactly the same circumstances prevailed at the time of the establishment and at the time of the dissolution of the Institute. The only change that had taken place was that ten days prior to the "dissolution resolution" of the Senate the previous University

administration had been replaced by a new acting administration (R.).[2]

3. In fact, the decision of the Court of Appeals affirmed the District Court's Conclusion of Law No. 3 (App. D) namely "That the Court has no jurisdiction in this case to control the internal management of the University." This raises a clear-cut and fundamental issue of law which "...would otherwise [i.e., if the instant case would not have interlocutory status] qualify as a basis for certiorari." Stern and Gressman, Supreme Court Practice, 3rd ed., pp. 148-149, citing *United States v. General Motors Corp.*, 323 U.S. 373, 377; *Land v. Dollar*, 330 U.S. 731, 734, n.2; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3. The aforesaid issue is that of judicial control and/or review of the actions of private associations, including this Nation's universities and colleges. See Note: "Judicial Control of Actions of Private Associations," 76 *Harvard Law Review* 983 (1963).

The courts below were led to believe that the instant case revolved around academic or curricular issues. In fact, the record shows that the instant case revolves around policy and administrative issues (App. D, *infra, pp.*). In Addition, Petitioner's second motion was based on prima facie tort and on issues of public policy (R.).

4. In this connection, Petitioner submits that the following words of this Court in *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) apply fully to the instant case:

> "An educational institution is not a constitutional sanctuary from [legislative] inquiry into

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[2]Respondents' reference in their brief for appellees (R.) that the Senate had recommended "...the dissolution of the Institute on the basis of...academic...considerations" is a gratuitous statement which has no foundation in the record of the instant case (R.)

> matters that may otherwise be within the constitutional legislative domain. . ."

This applies, *a fortiori,* to judicial review of questions which are within the constitutional judicial domain. In fact, it has recently been aptly said that

> ". . .it seems clear that the considerations militating against legislative intervention do not necessarily apply in the case of judicial review. Since the courts hear individual cases, factors of local significance can always be given due consideration" Note: "Academic Freedom," 81 *Harvard Law Review* 1045, 1151 (1968).

This Court has recently said in *Epperson v. State of Arkansas,* 389 U.S. 266, 270 (1968) that

> "Courts do not and cannot intervene in the resolution of conflicts which arise *in the daily operations* of school systems. . .On the other hand, 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'. . .and 'This Court will be alert against invasions of academic freedom. . .'" (Emphasis added).

Clearly, the instant case did not arise in the daily operations of the University which has not only been chartered by Congress (App. O) but is also, as the record shows, tax-exempt, the recipient of considerable public funds and supported by annual collections in all Roman Catholic churches in the United States (R.). The University–similar to nearly all other institutions of higher learning–is today more than ever under an obligation to be vigilant in the protection of constitutional freedoms and of the public interest. In the instant case the specific public interest of protecting students from the adverse effects of the dissolution of the Institute[3] only serves to emphasize the fact that for the

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[3]See p. 7 *supra.*

aforementioned reasons all private institutions of higher learning–including the University–are affected by public interests. See: *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (D.C. W.D. Missouri En Banc, 1968).

Although the internal management of corporations–including private institutions of higher learning–calls *generally* for judicial abstention, institutional autonomy is not the paramount social value. This autonomy "...is conditioned by the expectation that the courts will exercise remedial control" See: "Academic Freedom," 81 *Harvard Law Review supra* at 1151.

4. Specifically, the instant case raises the important question of judicial review of and intervention in the actions of private associations, including institutions of higher learning, in the event of prima facie tort. It has been aptly said that there exists

> "...an increasing willingness of the courts to impose upon associations possessing a high degree of power over nonmembers a duty not to injure them arbitrarily. Private Control of Actions of Private Associations," 76 *Harvard Law Review supra* at 1004.

And also

> "The doctrine of prima facie tort [i.e., an intentional act which without justification injures others] seems particularly useful in dealing with cases involving injury by the act of a private association since such groups frequently possess power to injure individuals through conduct not encompassed within conventional concepts" *Id.* at 1041.

In view of the aforementioned trends and doctrines, the Court of Appeals rendered in the instant case a decision which is clearly in conflict with this Court's decision in

Ohio Oil Co. v. Conway, 279 U.S. 813, (1929). There the Court said:

> "When the questions presented by an application for interlocutory injunction are grave and the injury to the moving party will be certain and irreparable if it be denied and the final decree be in his favor; while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be negligible, or may be indemnified by a bond, the injunction usually will be granted. . . . The order is vacated with directions for further proceedings in conformity with this opinion."

The decision of the Court of Appeals in the instant case is also in conflict with decisions of other courts of appeals on the same matter, namely:

> "The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated" *Love v. Atchison, T. & S. F. Ry.*, 185 F. 321, 331-22 (8 Cir. 1911). See also: *Benson Hotel Corp. v. Woods*, 168 F. 2d 694, 697 (8 Cir. 1948); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 743 (2 Cir. 1953); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F. 2d 867, 871, 872 (2 Cir. 1962).

The decision of the Court of Appeals also conflicts — even on the basis of its own reasoning — with *American Smelting and Refining Co. v. Godfrey*, 158 F.2d 225, 230 (8 Cir. 1907), *cert. den.* 207 U.S. 597 (1907) where the court said:

> "... we do not think the fact that an actual injury resulting from a violation of a right is small, and the

> interest to be affected by an injury is large, should weigh against the interposition of preventive power in equity, when it is clear that on the one hand a right is violated and on the other a wrong committed."

Finally, the decision of the Court of Appeals – even on the basis of its own reasoning – conflicts with *Hamilton Watch Co. v. Benrus Watch Co., supra,* at 740, where the court said:

> "To justify a temporary injunction . . . it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation."

Petitioner submits that the powers provided by 28 U.S.C. Section 1651 give this Court and/or the courts below ample opportunity to grant the relief sought by Petitioner by granting a mandatory injunction re-establishing the Institute as it existed on November 12, 1967.

CONCLUSION

Wherefore, for the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. ROBERTS
Petitioner pro se,

APPENDIX A

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

No. 21,501

September Term, 1968.

Civil 1381-66.

William H. Roberts,
Appellant,

v.

William J. McDonald, Individually, et al.,
Appellees.

No. 21,771

Filed Jan. 17, 1969

William H. Roberts,
Appellant,

v.

William J. McDonald and Catholic University,
Appellees.

Appeals from the United States District Court for the District of Columbia.

Before: McGowan, Leventhal, and Robinson, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the judgments of the District Court appealed from in these cases are hereby affirmed.

Per Curiam

For the Court:

Nathan J. Paulson
Clerk

Dated: January 17, 1969.
Opinion per curiam.

APPENDIX B

[Not to be printed or submitted to West for publication]

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 21,501

WILLIAM H. ROBERTS,
Appellant,

v.

WILLIAM J. McDONALD,
Individually, et al.,
Appellees.

No. 21,771

WILLIAM H. ROBERTS,
Appellant,

v.

WILLIAM J. McDONALD
and
CATHOLIC UNIVERSITY,
Appellees.

Appeals from the United States District Court for the District of Columbia

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Decided January 17, 1969

Mr. William H. Roberts, appellant pro se. *Mr. Richard L. Hirshberg* was on the brief for appellant.

Mr. Thomas A. Flannery, with whom *Mr. Stephen A. Trimble* was on the brief, for appellees. *Mr. Nicholas D. Ward* also entered an appearance for appellees.

Before McGOWAN, LEVENTHAL, and ROBINSON, *Circuit Judges.*

PER CURIAM: These appeals are from successive denials to appellant in the District Court of a preliminary injunction against the impending dissolution by appellee Catholic University of an administrative entity within its instructional arrangements known as the Institute of International Law and Relations. Appellant was the director of the Institute throughout its life, and is a professor at the University whose tenured position is not affected by the termination of the Institute and the transfer of its functions to established departments. In his complaint appellant sought both damages and injunctive relief, but all that is now before us is the refusal of appellant's requests for a preliminary injunction.

Injunctions pending appeal having been denied by this court and the Supreme Court, and the dissolution of the Institute having heretofore been accomplished, it is suggested that these appeals are moot. We do not, however, pursue that question because it seems clear to us in any event that the findings of fact made in the District Court are beyond serious challenge under Rule 52(a), *Fed. R. Civ. P.*, and that the denials of a preliminary injunction founded thereon were amply within the bounds of a sound judicial discretion. In this regard we remark the relevance of such factors as the nature of the injury alleged in relation to the need for equitable relief, the probabilities that appellant would ultimately prevail on the merits, and the balancing of appellant's claimed injuries with appellees' interest and convenience in respect of the efficient operation of a university. We also note that appellant concededly quarrels with the substance of the action taken to dissolve the Institute, and

presses no claim of a lack of opportunity for hearing or other alleged procedural shortcoming.[1]

Affirmed.

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[1] Various motions have been filed in this court. Insofar as they are not rendered moot by this opinion and accompanying order, they are denied.

APPENDIX C

UNITED STATES DISTRICT COURT

for the District of Columbia

WILLIAM H. ROBERTS *Plaintiff*	)	Civil Action No. 1381-66
v.	)	
WILLIAM J. McDONALD, *et al.* *Defendants*	)	Filed: NOV. 21, 1967 Robert M. Stearns, Clerk

ORDER

Upon consideration of the amended motion for preliminary injunction filed herein by the plaintiff, the opposition thereto of the defendant, and upon further consideration of the argument of counsel in open court, and it appearing to the Court that said motion should be denied, it is, by the Court, this *21st* day of November, 1967.

ORDERED, that the amended motion of the plaintiff for a preliminary injunction be and the same is hereby denied.

/s/ John J. Sirica

JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
for the District of Columbia

WILLIAM H. ROBERTS, *Plaintiff,*	)	
v.	)	Civil Action No. No. 1381-66
WILLIAM J. McDONALD, *et al., Defendants.*	)	Filed NOV. 21, 1967 Robert M. Stearns, Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon consideration of the Amended Motion for Preliminary Injunction filed herein by plaintiff, the Opposition thereto of the defendant, the record and file of this case, and the arguments of counsel at the hearing thereof, the Court makes the following:

FINDINGS OF FACT

1. That plaintiff, a teacher in the fields of politics and international law and relations, has been employed by the defendant University for a period in excess of twenty years.

2. That the defendant Catholic University of America is a recognized educational institution of higher learning, chartered pursuant to an Act of Congress for non-profit educational purposes.

3. That said University is operated, managed and controlled by a Board of Trustees, pursuant to the Statutes of the Catholic University of America, which are binding upon all persons connected with the University, including the plaintiff herein.

4. That plaintiff, effective February 1, 1962, was appointed by the Rector of the University as an Ordinary

Professor, at an annual salary of $8,500.00 (since increased pursuant to the University's salary structure), and enjoys permanent tenure as an Ordinary Professor until retirement under the Statutes of the University.

5. That plaintiff was subsequently given a supplementary appointment as head of the Department of Politics from November 1, 1963 to October 31, 1965 at a salary of $250.00 per year in addition to his salary as an Ordinary Professor.

6. That the Board of Trustees, on January 21, 1965, authorized the establishment of the Institute of International Law as distinct and separate from the Department of Politics, and approved the appointment of the plaintiff as Director of said Institute.

7. That on February 5, 1965, pursuant to another resolution contained in the action of the Board of Trustees aforesaid, a meeting was held between plaintiff, the Rector of the University, and the heads of certain other departments of the University. At said meeting, a plan for the implementation of the Trustees actions were adopted by those in attendance.

8. That effective September 1, 1965, plaintiff's earlier appointment as head of the Department of Politics was revised to read "... to the position of Director of the Institute of International Law and Relations ...".

9. That plaintiff's appointment aforesaid, effective November 1, 1965, was further supplemented to read "... and continuing until further notice at a salary of $250.00 per year payable in monthly installments of $20.83...", and that said salary was later increased pursuant to the University's salary structure.

10. That since his appointment as Director of said Institute, plaintiff has served as Director of the Institute of International Law and Relations, and has received his full salary as an Ordinary Professor, as well as the additional stipend as Director of said Institute.

11. That on October 26, 1967, at a meeting of the Academic Senate of the University, the following transpired:

"Dr. Cardozo read the following resolution, unanimously adopted by the Faculty of the Graduate School of Arts and Sciences at its meeting on 24 October, 1967.

"Resolved: that the delegate to the Academic Senate inform the Senate of our deep concern over the situation of students pursuing courses in the Institute of International Law and Relations and of our desire that the Senate take appropriate action"

The resolution adopted by the Senate on 31 May, 1967, regarding the Institute of International Law and Relations was then discussed. Dr. Rock proposed the following motion:

"That the Senate recommend to the Board of Trustees that, effective at the beginning of the second semester of the current academic year, the Board dissolve the Institute and transfer the programs now administered by the Institute to the Department of Politics of the Graduate School of Arts and Sciences. This recommendation is based on the following considerations of policy:

1. The Institute, as presently constituted, is an anomaly, as is recognized in its representation in the Academic Senate only through the intervention of the Executive Vice Rector.

2. Article 41 of the Statutes assigns to the Senate responsibility for perfecting courses of study and for proposing candidates for Academic Degrees. The Director of the Institute refuses to recognize the competence of the Senate in these matters.

3. Members of the staff of the Institute belong to no faculty and are unable to exercise normal faculty functions or secure adequate representation.

4. Policy and practice in other universities tends to discourage proliferation of degree granting institutes, and to concentrate jurisdiction over academic degrees in normal academic channels.

Further, this recommendation is based upon administrative considerations and experience as follows:

1. The Institute was established without the preliminary planning which should have been undertaken with the cooperation of the Graduate School and the Academic Senate.

2. The Director of the Institute has declined to report to the Academic Senate as required by the Statutes and by custom.

The motion was seconded by Dr. Cardozo and, after discussion, adopted by voice vote."

12. That on November 2, 1967, the Acting Rector of the University notified plaintiff in writing of the action of the Academic Senate aforesaid, and that the same would be presented to the Board of Trustees at its meeting of November 12 and 13, 1967. In addition, the Acting Rector notified plaintiff that he would recommend that if the Board of Trustees voted to dissolve the Institute, all members of the faculty (including plaintiff) and lecturers holding appointments to the Institute shall be transferred to the Department of Politics.

13. That on November 2, 1967, plaintiff filed herein his amended motion for preliminary injunction seeking to enjoin the University from implementing said resolution.

CONCLUSIONS OF LAW

1. That the authorization for the creation of the Institute of International Law and Relations by the Board of Trustees aforesaid, as well as the implementation thereof contained no

provision that said Institute was to endure in perpetuity for a stipulated period of years, or that plaintiff was to be the Director thereof on a permanent basis.

2. That authority and jurisdiction is conferred by the Statutes of the University upon the Academic Senate and the Board of Trustees to initiate and implement the resolution of October 26, 1967.

3. That the Court does not have jurisdiction in this case to control the internal management of the University.

4. That the plaintiff has failed to make any showing of irreparable injury.

5. That if the plaintiff can prove a breach of contract and damages resulting therefrom he has an adequate remedy at law.

/s/ John J. Sirica

District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. ROBERTS Plaintiff	)	
vs.	)	Civil Action
WILLIAM J. McDONALD	)	No. 1381-66
and	)	
THE CATHOLIC UNIVERSITY OF AMERICA	)	
Defendants	)	

ORDER DENYING
PLAINTIFF'S SECOND AMENDED MOTION
FOR PRELIMINARY INJUNCTION

Upon consideration of the plaintiff's Second Amended Motion for Preliminary Injunction filed herein January 23, 1968, the Opposition of Defendant Catholic University to Plaintiff's Second Amended Motion for Preliminary Injunction, Plaintiff's Reply to Opposition of Defendant Catholic University to Plaintiff's Second Amended Motion for Preliminary Injunction, and upon further consideration of the record and file in this case and the arguments of counsel for the respective parties in open court, and it appearing to the Court that the plaintiff has failed to make any showing that he is entitled to the extraordinary relief requested, it is by the Court this *8* day of February, 1968

ORDERED, that the Plaintiff's Second Amended Motion for Preliminary Injunction be and the same is hereby denied.

/s/ _____
JUDGE

APPENDIX F.

ORAL REMARKS OF THE COURT
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HEARING, February 2, 1968

THE COURT: I find nothing in the second amended motion that would change the situation as it existed when Judge Sirica ruled and the Court of Appeals ruled on the request to keep the matter in status quo.

I will deny the second amended motion for preliminary injunction.

APPENDIX G

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1967
Civil 1381-65

No. 21,501

William H. Roberts,

Appellant,

v.

William J. McDonald, Individually, et al.,

Appellees.

Before: Burger, Tamm, and Robinson,
Circuit Judges, in Chambers.

ORDER

On consideration of appellees' motion to dismiss and of appellant's objections thereto and appellees' reply; and on consideration of appellant's motion to extend the time for filing his brief and joint appendix herein, it is

ORDERED by the Court that appellees' aforesaid motion to dismiss be denied, and it is

FURTHER ORDERED by the Court that appellant's time for filing his brief is extended for a period of 25 days from the date of this order.

Per Curiam.

APPENDIX H

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1967
Civil 1381-66

No. 21,501

William H. Roberts,

Appellant,

v.

William J. McDonald, Individually, et al.,

Appellees.

No. 21,771
William H. Roberts,

Appellant,

v.

William J. McDonald and Catholic University,

Appellees.

Before: Bazelon, Chief Judge,
In Chambers.

ORDER

On consideration of appellant's motion to consolidate the above appeals and to enlarge the time for filing appellant's brief and the joint appendix herein, it is

ORDERED that the above cases are consolidated for all purposes, and appellant's time for filing his brief and the joint appendix is extended to and including May 5, 1968.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1967
Civil 1381-66
No. 21,501

William H. Roberts,
Appellant,

v.

William J. McDonald, Individually, et al.,
Appellees

No. 21,771

William H. Roberts,
Appellant,

v.

William J. McDonald and
Catholic University,
Appellees.

Before: Bazelon, Chief Judge, in Chambers.

ORDER

On consideration of Appellant's motions to review the orders of this Court filed on July 9 and July 18, 1968 and to reconsider the order filed on July 18, 1968 and Appellant's motion to enlarge the time for filing his brief, it is

ORDERED that not withstanding the orders heretofore entered the Clerk is directed to file Appellant's lodged brief in this case. Appellees' brief shall be filed within 30 days from the date of this order, September 5th.

APPENDIX J

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1967
Civil Action 1381-66

No. 21,501

William H. Roberts,

Appellant,

v.

William J. McDonald, Individually, et al.,

Appellees.

No. 21,771

William H. Roberts,

Appellant,

v.

William J. McDonald and
Catholic University,

Appellees.

Before: Wright, Acting Chief Judge,
in Chambers.

ORDER

On consideration of Appellant's motion to review the order of this Court filed on August 6, 1969, wherein he requests that Appellees be ordered to file their brief forthwith or, if the Appellees file an appropriate motion, that they be ordered to file their aforesaid brief on or before August 20, 1968, it is

ORDERED that the aforesaid motion is denied.

APPENDIX K

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1968
Civil 1381-66

No. 21,501

William H. Roberts,
Appellant,

v.

William J. McDonald, Individually, et al.,
Appellees.

No. 21,771

William H. Roberts,
Appellant,

v.

William J. McDonald and Catholic University,
Appellees.

Before: Bazelon, Chief Judge, in Chambers.

ORDER

On consideration of the following: (1) appellees' motion for extension of time to and including October 7, 1968, for filing appellees' brief and appellant's opposition thereto; (2) appellant's motion filed herein on August 29, 1968, entitled "Motion to vacate the order of the acting Chief Judge of this Court filed on August 21, 1968"; (3) appellant's motion filed herein on September 3, 1968, entitled "motion of appellant pursuant to Rules 27(b) and 2 of the Federal Rules of Appellate Procedure to expedite determination of his

motion to vacate the order of this Court filed on August 21, 1968"; (4) appellant's motion filed herein on September 3, 1968, entitled "Second motion of appellant pursuant to Rules 27(b) and 2, Federal Rules of Appellate Procedure, to expedite determination of motion of appellant to review the order of this Court filed on August 6, 1968"; (5) appellant's motion filed herein on September 5, 1968, entitled "motion of appellant pursuant to Rules 45(b) and 2 of the Federal Rules of Appellate Procedure, and Rule 11(b) of the General Rules of this Court to advance the time for the hearing of the above entitled appeal"; and (6) appellant's motion filed herein on September 5, 1968, entitled "motion of appellant pursuant to Rules 27(b) and 2 of the Federal Rules of Appellate Procedure to expedite determination of his motion pursuant to Rules 45(b) and 2 of the Federal Rules of Appellate Procedure, and Rule 11(b) of the General Rules of this Court to advance the time for the hearing of the above entitled appeal"; and it appearing that counsel for appellees have lodged appellees' brief with the Clerk of this Court within the extended period of time requested by their aforesaid motion, it is

ORDERED that the Clerk is hereby directed to file appellees' lodged brief and it is

FURTHER ORDERED that appellant's aforesaid motions are denied.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968
Civil 1381-66

No. 21,501

William H. Roberts,
Appellant,

v.

William J. McDonald, Individually, et al.,
Appellees.

Before: Bazelon, Chief Judge, in Chambers.

ORDER

It is ORDERED, *sua sponte,* pursuant to Rule 11 of the General Rules of this Court that the Clerk is directed to place this case on the summary calendar.

APPENDIX M

AFFIDAVIT

STATE OF VIRGINIA, SS:

COUNTY OF ARLINGTON, SS:

I, Sylvia D. Crutchfield, being duly sworn upon oath, depose and state that:

1. I am an adult citizen of the United States and am secretary to Richard L. Hirshberg, Esq., 132 Third Street, S.E., Washington, D.C., who represents the Appellant, William H. Roberts, in a case pending in the United States Court of Appeals for the District of Columbia Circuit, namely Roberts v. McDonald, Nos. 21501 and 21771.

2. I had been instructed to call the Clerk's Office, United States Court of Appeals for the District of Columbia Circuit in the course of the morning of July 26, 1968, and to make inquiry regarding the status of a Motion filed by Mr. Hirshberg in behalf of the aforesaid Appellant on July 25, 1968. The aforementioned Motion requested enlargement of time to comply with the Order of the aforementioned Court of Appeals filed on July 18, 1968, providing "* * * that Appellant's time for filing a brief in conformity with the Federal Rules of Appellate Procedure and the General Rules of this Court is extended to a period of fifteen days from the date of this order."

3. When I called the Office of the Clerk of the aforesaid Court of Appeals in the course of the morning of July 26, 1968, I addressed my inquiry to Mrs. Elizabeth E. Nameth of the Clerk's Office. Mrs. Nameth informed me that the aforesaid Motion was being sent to the Chief Judge together with other Motions and that there was no certainty as to what time such motion would be acted on but that I might call back about 2:30 P.M. to inquire.

4. At approximately 2:50 P.M. I called Mrs. Nameth, who transferred me to Mr. Stevas' secretary. I addressed my inquiry to her and she left the phone to check the status of the motion.

Mr. Stevas himself then picked up the phone and the following conversation ensued:

Q. Is this Mr. Stevas?

A. Yes.

Q. Mr. Stevas, this is Sylvia Crutchfield, Richard Hirshberg's secretary. I want to ask about the status of a motion to enlarge time for filing brief in Roberts v. McDonald. Has a decision been made on this motion?

A. No. The judge is unavailable and I don't know when he will get to it.

Q. Is it possible that he will be able to make a decision this afternoon?

A. Now listen, I'm getting damn tired of Hirshberg dropping motions off here one day and calling up the next to see why they haven't been signed. Did he get opposing counsel to agree? You know opposing counsel has 7 days to answer in. Of course, the judge can handle it himself. I called Flannery myself to see if he had any objections. Flannery said he had no objection to a 2-week extension of time and I'll tell the judge that and he'll probably go ahead and sign it. Why couldn't Hirshberg pick up the phone and call himself? I'm tired of doing Hirshberg's work for him. I've had this out with him before. This isn't the way we practice law here.

Q. The reason we are so rushed on this particular motion is because Dr. Roberts must notify the printer today so that he may get the brief done on time.

A. You meant it isn't at the printers already? He should have sent it to them when the first order to reprint came down instead of filing all these motions. The Clerk and the Deputy Clerk – which is me – are sick and tired of all these

motions. Why the judge might just say no, no, no to all these motions and order Hirshberg to show cause why the whole thing shouldn't be dismissed. And you can quote me to Hirshberg!

Q. I'll omit the damn.

A. Yes, strike that.

Q. When can we find out the judge's decision?

A. When you come down and pick up a copy of the order.

5. Immediately after the telephone conversation had ended I recorded this conversation and reported it, also immediately to Appellant.

6. I can affirm under oath that the aforesaid record made by me is a complete, true and accurate re-statement of the conversation which I had on the aforementioned occasion with Mr. Stevas.

/s/

SYLVIA D. CRUTCHFIELD

State of Virginia, ss:

County of Arlington, ss:

Subscribed and sworn to before me this *30th* day of August, 1968.

APPENDIX N

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

I. Richard L. Hirshberg, being duly sworn upon oath, depose and state that:

1. I am an adult citizen of the United States and a member of the bars of the United States Supreme Court, the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia. I represent the Appellant, William H. Roberts, in a case pending in the United States Court of Appeals for the District of Columbia Circuit, namely Roberts v. McDonald, Nos. 21501 and 21771.

2. In the aforesaid case I filed in behalf of Appellant in the aforementioned Court of Appeals on July 25, 1968, the following three Motions

a. A Motion of Appellant to review the orders of the Chief Judge of the aforesaid Court of Appeals respectively filed on July 9, 1968 and July 18, 1968, denying Appellant's Motion to Exceed Page Limitation in Brief for Appellant;

b. A Motion of Appellant to reconsider the Order of the Chief Judge of the aforesaid Court of Appeals filed on July 18, 1968, denying Appellant's Motion to Reduce Time Period to File Brief for the Appellees, and

c. A Motion of Appellant to enlarge time to comply with the Order of the aforesaid Court of Appeals filed on July 18, 1968, providing:

> "* * * that Appellant's time for filing a brief in conformity with the Federal Rules of Appellate Procedure and the General Rules of this Court is extended for a period of fifteen days from the date of this order."

3. On July 26, 1968, I left Washington, D.C. for my vacation in Merrill, New York. On August 2, 1968, the day on which the aforesaid 15-day period "for filing a brief in conformity with the Federal Rules of Appellate Procedure * * " expired, I was informed that, although previous inquiries as to the disposition of the aforesaid Motion had been made, it had not yet been acted upon.

4. Thereupon, I called the Chief Deputy Clerk of the aforesaid Court of Appeals, Alexander L. Stevas, Esq., long-distance in order to make appropriate inquiries as to the disposition of the aforesaid three Motions. In the course of the aforesaid telephone conversation, Mr. Stevas told me that he was going to take up Appellant's Motion for review of the Chief Judge's aforementioned Order of July 18, 1968 with Chief Judge Bazelon. When I directed Mr. Stevas' attention to the fact that this was a Motion for Review which had to be considered by the Court, he replied that he discussed all motions with the Chief Judge. Stevas then added:

> "Now that he [Chief Judge Bazelon] has put you through the wringer in connection with your Motion for Reconsideration [which had been denied by an Order of July 18, 1968] and has cooled off, perhaps he will allow the longer brief to be filed."

5. The above statements of Mr. Stevas were recorded by me immediately after the telephone conversation had ended and were also, in a long-distance call, immediately related to Appellant.

/s/
RICHARD L. HIRSHBERG

District of Columbia, ss:

Subscribed and sworn to before me this *30th* day of August, 1968.

APPENDIX O

Public Law, 235, Seventieth Congress, First Session, 45 Stat. 492 (1928)

CHAP. 312 – An Act Supplementary to, and amendatory of, the incorporation of the Catholic University of America, organized under and by virtue of a certificate of incorporation pursuant to class 1, chapter 18, of the Revised Statutes of the United States relating to the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the incorporation of the Catholic University of America under chapter 18, Revised Statutes of the United States relating to the District of Columbia, be, and the same is hereby, approved and confirmed.

SEC. 2. That in addition to the rights, duties, and obligations enjoyed and imposed by chapter 18 of the Revised Statutes of the District of Columbia the said university may enter into affiliated agreements with any institutions of learning within or outside of the District of Columbia, for the purpose of giving to students of such institutions the educational facilities of said university, upon such terms as are mutually agreed upon by the said university and the affiliated institutions.

SEC. 3. That said university shall have, and is hereby given, the power to increase the number of its trustees from time to time by a two-thirds vote of the whole number of the trustees at the time such vote is taken to a number not exceeding fifty.

In case of the increase of the number of trustees a certificate stating the number of the board and the time when it shall go into effect, and that the action so taken was by a two-thirds vote as required by this Act, shall be filed with the Recorder of Deeds of the District of Columbia.

SEC. 4. The said board of trustees shall have, and are hereby given, full power and authority, by a vote of two-thirds of its members, to adopt and change by-laws for the conduct of the business and educational work of said university, to fix the time of meetings, regular and special, and the form of notice to be given; they may appoint an executive committee composed of trustees, designate the number and chairman thereof, with such powers and authority as are usually exercised by an executive committee, and which shall be conferred by the board subject always to the control of the board of trustees; they may create and establish schools and departments of learning to be connected with and become a part of said university, and establish such scholastic boards and officers as may be required for academic operation and direction in education; they may receive, invest, and administer endowments and gifts of money and property absolute or subject to payments by way of annuities during the life of the donor, for the maintenance of educational work by said university and by any department or chair thereof, now established or which may hereafter be created or established by said university, and they shall have all of the powers and authority heretofore granted to or invested in the trustees of said university by chapter 18 of the Revised Statutes of the United States relating to the District of Columbia.

SEC. 5. That nothing in this Act contained shall be so construed as to prevent Congress from altering, amending, or repealing the same.

Approved, April 3, 1928.

APPENDIX P

Federal Rules of Appellate Procedure

Rule 2 Advisory Committee's Note –

The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.

APPENDIX Q

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

GENERAL RULES
SUPPLEMENTING THE
FEDERAL RULES OF APPELLATE PROCEDURE

Rule 8(d) Contents of Brief. In addition to the requirements of Rule28, Federal Rules of Appellate Procedure, at the bottom of the statement of issues presented for review, counsel shall indicate whether or not the pending case was previously before this court under the same or similar title and the name and number of such prior case, to enable the court to determine whether the instant case should be assigned to a particular division of the court, or to a new division chosen by lot.

Rule 11(d) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify extended oral argument, the case may be placed on the summary calendar.

No separate summary calendar will be maintained. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court. Such cases may or may not be heard on days set for oral argument of cases not on the summary calendar.

Rule 12(b) Time Allowed for Argument. Counsel in all cases scheduled for argument on the merits shall be allotted 30 minutes to a side, except that only 15 minutes to a side shall be allotted to cases placed on the summary calendar and to motions scheduled for argument. A motion or request pursuant to Rule 34(b), Federal Rules of Appellate Procedure, for the allowance of additional time shall be filed or made not later than 10 days after appellee's brief has been filed.

Where two or more cases are consolidated they shall be considered as one case for the allotment of time for argument.

APPENDIX R

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,682

MILTON M. LEVIN,
Appellant,

v.

RAMSEY CLARK,
Attorney General of the United States,
Appellee.

[Filed December 16, 1968]

Before: Bazelon, Chief Judge, Danaher, Burger, Wright, McGowan, Tamm, Leventhal and Robinson, Circuit Judges, in Chambers.

ORDER

On consideration of appellee's Petition for Rehearing, *En Banc*, and appellant's opposition thereto, it is

Ordered by the Court, *En Banc*, that appellee's aforesaid petition is denied.

Per Curiam.

Circuit Judges Danaher, Burger and Tamm would grant appellee's petition for rehearing *en banc*.

A separate statement of Cricuit Judge McGowan, concurred in by Circuit Judges Leventhal and Robinson, as to why he voted against rehearing *en banc* is attached.

A separate statement of Circuit Judge Wright as to why he voted against rehearing *en banc* is attached.

A separate statement of Circuit Judge Danaher as to why he voted for rehearing *en banc* is attached.

A separate statement of Circuit Judge Burger as to why he voted for rehearing *en banc* is attached.

Separate Statement on Rehearing En Banc

Burger, *Circuit Judge*: I am satisfied that a majority of the entire court would never have reached the result decided by the majority of the present panel but at the same time less than five Judges[1] believe the panel has laid down a new rule or doctrine of such scope and importance that it merits *en banc* review. Viewed in this light, the holding in *Levin v. Katzenbach*, 124 U.S.App.D.C. 158, 163, 363 F.2d 287, 292 (1966), is therefore confined to its own peculiar facts.

However, I cannot refrain from pointing out, again, as I have before,[2] that the record before us shows – conclusively and beyond dispute – that the information which the panel majority regards as "newly discovered evidence" which Judges Bazelon and Edgerton held the prosecution should have realed to the defense was in fact *literally in the hands of defense counsel* as he sat at counsel table and conducted examination of witnesses in the original trial. This is shown in Judge McGowan's opinion where he recites what Mr. Jacob Stein testified to at the remand hearing and also in the contents of the deposition which Stein utilized in this cross-examination.

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[1]During consideration of the Government's motion for rehearing *en banc* this court has had only 8 active judges.

[2]Levin v. Katzenbach, 124 U.S.App.D.C. 158, 163, 363, F.2d 287, 292 (1966); Levin v. Clark, No. 20,682 (D.C. Cir., Nov. 15, 1967).

It is not rationally possible to reconcile Mr. Stein's testimony with the notion that he was not aware of the transaction unless we are to assume that Mr. Stein was asleep or otherwise unaware of what was going on around him. Since Mr. Stein is one of the most experienced and able trial lawyers of our bar, I, of course, reject the idea that he did not grasp the facts. Moreover, Mr. Stein's appraisal of the situation was a sound one which any competent advocate would reasonably reach.

What is more important is that any tendency for anyone to read a "new rule" into this case is dispelled by what Mr. Justice Fortas said in *Giles v. Maryland*:

> This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or *speculative information.* But this is not the case.

386 U.S. 66, 98 (1967) (concurring opinion) (emphasis added). The highest classification which can fairly be accorded to the "information" which Judges Bazelon and Edgerton said the prosecution should have furnished is that it is "speculative" in an ultimate degree.

Perhaps a "footnote" to this case may not be out of order in relation to the time this court has taken to resolve issues which lead to commanding a new trial:

> February, 1959 – date of the alleged criminal acts;
>
> November 1, 1962 – Appellant was indicted;
>
> May 10, 1963 – conviction by jury for grand larceny;

June 30, 1964 – the conviction was affirmed per Judges Washington and Bastian (Bazelon dissenting), *Levin v. United States,* 119 U.S. App.D.C. 156, 338 F.2d 265 (1964);

February 1, 1965 – a petition for writ of certiorari was denied by the Supreme Court, 379 U.S. 999 (1965);

February 25, 1965 – Appellant filed a petition for a writ of habeas corpus which was denied by the District Court on June 11, 1965, 249 F. Supp. 225 (D.D.C. 1965);

December 23, 1965 – this court reversed and remanded the case, *Levin v. Katzenbach,* 124 U.S.App.D.C. 158, 363 F.2d 287 (1966), and took the extraordinary step – one never taken before – of releasing him from prison while the habeas corpus claims were being reconsidered;

October 25, 1966 – the District Court resolved the remand question and the case returned here again, *Levin v. Katzenbach,* 262 F. Supp. 951 (D.C.C. 1966);

November 15, 1967 – this court again reversed ordering a new trial and I dissented, *Levin v. Clark,* No. 20,682(D.C. Cir., November 15, 1967).

The action of this court ordering a new trial was – and is – a gross miscarriage of justice which puts on the Government the burden of retrying a case on facts which occurred in February of 1959. Understandably the Government moved for rehearing *en banc* on January 10, 1968; this court's action on that petition alone has added approximately one year's delay.

The prosecution is now confronted with trying to reconstruct its case nearly 9 years after the event. The public should be pardoned if it loses confidence in the

administration of criminal justice when it takes this long for the judicial process to dispose of a simple criminal case – and then only to order a new trial in circumstances where such trial will take place nearly a decade after the crime.

APPENDIX S

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 21,974

RUDOLPH N. THORNTON,
Petitioner

v.

HONORABLE HOWARD F. CORCORAN,
Respondent

On Petition for Writ of Mandamus

Decided January 3, 1969

Mr. Allan M. Palmer for the petitioner.

Mr. Roger E. Zuckerman, Assistant United States Attorney, with whom *Messrs. David G. Bress,* United States Attorney, and *Frank Q. Nebeker,* Assistant United States Attorney, were on the opposition to the petition.

Mr. Sidney Edelman filed a brief on behalf of Saint Elizabeths, as amicus curiae.

Mr. William H. Allen filed a brief, as amicus curiae. *Mr. William A. Dobrovir* was also on the brief, as amicus curiae.

Before BAZELON, *Chief Judge*, BURGER and ROBINSON, *Circuit Judges.*

* * *

United States Court of Appeals
for the District of Columbia Circuit

No. 21,974 — September Term, 1968

Rudolph N. Thornton,
Petitioner

v.

Honorable Howard F. Corcoran,
Respondent.

Grand Jury 859-68
(Criminal 884-68)

[Filed Oct. 17, 1968]

Before: Bazelon, Chief Judge; and Burger and Robinson, Circuit Judges, in Chambers.

ORDER

In the above-entitled case, this Court on September 20, 1968, filed a memorandum order designed to avoid delay, while the petition for writ of mandamus was pending decision in the proceedings in petitioner's criminal case. As the memorandum order stated, this Court was "confident that the situation can be promptly and adequately rectified" in the District Court. This Court having now been informed that further steps have not been promptly taken to rectify the misunderstanding which has occurred, resulting in a failure to hold the staff conference which Saint Elizabeths Hospital assured this Court would be held if its motion for relief from the July 9, 1968, order of this Court were denied, it is

ORDERED by the Court, *sua sponte,* in the interest of expediting the proceedings, that the aforesaid memorandum order of September 20, 1968, be modified to direct the District Court (1) to proceed forthwith and without any further delay whatsoever to cause the petitioner to be placed in the same position he was in prior to the certification by the hospital authorities to the District Court that he was competent to stand trial, and (2) to direct

that the hospital proceed forthwith in accordance with the representation contained in its amicus curiae brief, which this Court relied upon, to accord to petitioner a staff conference, with the incidents directed in this Court's order of July 9, 1968. This order does not contemplate the further commitment of petitioner to Saint Elizabeths Hospital except for whatever minimum period is required to conduct the staff conference.

The Clerk of this Court shall issue forthwith a certified copy of this order to the District Court.

Per Curiam.

Circuit Judge Burger did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 21,974 **September Term, 1968**

Rudolph N. Thornton,
Petitioner

v.

[Filed Nov. 18, 1968]

Honorable Howard F. Corcoran,
Respondent

BURGER, *Circuit Judge, dissenting:* I dissent from the foregoing order (which was entered during my absence and without notice to me). I dissent because this court is totally without lawful power or authority to order or direct St. Elizabeths Hospital on the matter of holding or not holding a staff conference; or on how it is to conduct the internal diagnostic processes on which the Superintendent may rely in carrying out his statutory duties relating to the determination of competency to stand trial.

Congress has by statute[1] vested exclusively in the Superintendent of St. Elizabeths Hospital the duty to certify whether an accused is competent to stand trial; the District Court is not bound by that certification; criteria for that determination are not in issue. The certifying power is vested in an official person, the Superintendent, not his staff. The diagnostic process and internal administrative steps by which the Superintendent informs himself in the performance of his statutory duty is a medical matter totally beyond the power and surely beyond the competence of judges of this court or any court. The Superintendent of St. Elizabeths may reach his conclusions by reading the medical record, by personally interviewing the accused by consulting with staff members or any other means which in his professional judgment as a physician seem proper.[2] Indeed a very large number of such certifications are made by the Superintendent without any staff conference being held.[3] His certificate can,

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[1] 24 D.C. Code 301(b) (1967).

[2] The internal diagnostic process is not dissimilar to the institutional decisions rendered by administrative agencies which have consistently withstood Constitutional attack. *E.g.*, United States v. Morgan, 313 U.S. 409 (1941); Morgan v. United States, 304 U.S. 1 (1938); *cf.* Morgan v. United States, 298 U.S. 468, 481 (1936). In the *Morgan* cases the Supreme Court insulated the administrative process from indiscreet visitations by the unfriendly eye. The principle of the *Morgan* cases applies with added force here since a staff conference is not in any sense a hearing of an adjudicatory nature. *See also* Hannah v. Larche, 363 U.S. 420 (1960).

[3] It seems clear, and indeed there have been no express contentions to the contrary, that the holding of a medical staff conference at St. Elizabeths Hospital lies entirely within the *discretion* of the hospital Superintendent and that the need for such a conference has traditionally been determined on a case by case basis. "Of some 570 reports made to the courts of the District of Columbia since January 1, 1968 with respect to persons committed under 24 D.C. Code 301, 300 reports were made after a staff conference and approximately 270 were made without a staff conference." (Supplemental Memorandum for Saint Elizabeths Hospital, *Amicus Curiae*, at 6; *accord, id.* n. 4)

of course, be challenged and he can be cross-examined in the District Court hearing; any alleged infirmities in his diagnostic process may be explored.

To me it is not simply irregular for judges to instruct physicians on how they should make a diagnosis; in my view the order entered by Judges Bazelon and Robinson on October 17, 1968 commanding the Superintendent of St. Elizabeths Hospital to hold a conference and make a tape recording of that conference was a flagrant abuse of judicial power.[4] Except for the fact that the issue was probably moot as a practical matter when that order was

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[4]The Court's order was tantamount to a writ of mandamus since it commanded the District Court to direct the hospital to conduct a medical staff conference. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction. . . ." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). The issuance by an appellate court of a mandamus against a District Court is erroneous in the absence of any substantial allegation of a usurpation or flagrant abuse of power. *Compare* Will v. United States, 389 U.S. 90 (1967), *with* Schlagenhauf v. Holder, 379 U.S. 104 (1964). "The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' " *Id.* at 112, quoting Parr v. United States, 351 U.S. 513, 520 (1956). "(T)he fact this case involves a criminal prosecution has contextual relevance" which further militates against the use of mandamus. Will v. United States, *supra*, at 100 n. 10. Of equal importance is that courts will not interfere by way of mandamus except to enforce merely ministerial acts required by law to be performed. *See* note 3 supra.

entered[5] and is perhaps legally moot now,[6] I would move this court, *en banc*, to vacate and set aside the order of October 17, 1968.

All of the orders entered in this case arise out of Petitioner's desire to have his counsel present at the Medical Staff Conference and he relies heavily on *Gilbert v. California*, 388 U.S. 263 (1967) and *United States v. Wade*, 388 U.S. 218 (1967). It is clear, however, that those decisions and other right-to-confrontation cases are totally inapposite. Noting that "the requirements of due process frequently vary with the type of proceeding involved" the Supreme Court, in *Hannah v. Larche*, 363 U.S. 420, 440 (1960), concluded that the right to confrontation did not apply to investigations conducted by the Civil Rights Commission. As in *Hannah*, the Medical Staff Conference here

> is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short. . .(it) does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts. . . .
>
> * * *

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[5]On July 30, 1968 the Superintendent of St. Elizabeths Hospital fulfilled his statutory duty under 24 D.C. Code 301(b) (1967) when he filed a certificate advising that the Defendant was competent to stand trial.

[6]We have been informed that, pursuant to this Court's most recent order, St. Elizabeths Hospital on October 24, 1968, at 10:30 A.M. held a medical staff conference which was recorded on audio tape. Supplemental Memorandum for St. Elizabeths Hospital, *Amicus Curiae*, at 2.

> [I]t investigates and reports leaving affirmative action, if there is to be any, to other governmental agencies where there must be action *de novo*.

Id. at 441, 452. (Emphasis supplied.)

There is no legal basis for equating a Medical Staff Conference to a "confrontation" either in the traditional sense or within the meaning of *Wade-Gilbert*. Those cases apply only to critical prosecutive stages. The vice of requiring a sensitive diagnostic process to be conducted as though it were an adversary matter seems too obvious to need discussion. The value of that process is undermined by anything which inhibits the free exchange of views; the integrity of the process makes privacy imperative. The presence of a lawyer for the patient at a staff conference would obviously inhibit the free expression and exchange of ideas which normally occurs. The check on the processes by which the Superintendent of the Hospital reaches his conclusion is the power to cross examine him.

The legal method of inquiry is unsuited to the medical investigation to be conducted. Medical diagnostic procedures should not be inhibited by non-medical notions of procedural "due process." Indeed it is far more consonant with the sympathetic relationship existing between Doctor and patient that the medical inquiry be divested as much as possible of an adversary character. Our approach should encourage an attitude of cooperation rather than partisanship; emphasis must be on the common pursuit for an objective, uninhibited inquiry, uncluttered by the techniques and devices of the courtroom.